

**The Right Honourable Henry Lord Viscount
Irwin, in that Part of Great Britain call'd Appellant.
of Scotland,**

**William Simpson, Thomas Morris, Tho-
mas Hill, Edward Forster, Richard
Middlebrooke, Thomas Middlebrooke,
and Samuel Meggot, Respondents**

The Appellant's C A S E.

By a Decree of his Majesty's Court of Exchequer at Westminster, dated the 20th November, 8 Car. I. and made in two Causes there depending, the one between Sir Cornelius Vermuyden, Knight, Complainant, against Robert Portington and others, Defendants; and the other between Henry Lea and the said Robert Portington and others, Complainants, against the said Sir Cornelius Vermuyden, Defendant, setting forth, that the said Sir Cornelius Vermuyden, Fee-farmer to his Majesty, of the Lordship and Manor of Hatfield, in the County of York, and of divers other Manors, Lands, and Tenements in the said County of York, exhibited his English Bill into the said Court, thereby shewing, that his said Majesty King Charles was, in the second Year of his Reign, seized in Fee, as in Right of his Crown and Dukedom of York, of and in the Lordship of Hatfield and Thorne and Ditch Marshes, with the Appurtenances, and of divers Wastes, Waste Ground, and Commons, to the said Lordship belonging, or near thereto adjoining, in the said County of York, great Part whereof was then subject to be surrounded and drowned with Water, so that little or no Benefit at all could be made thereof.

And that by certain Articles of Agreement, made the 24th of March, 2 Car. I. between his said Majesty of the one Part, and the said Sir Cornelius Vermuyden of the other Part, the said Sir Cornelius undertook to drain the said drowned Grounds, and in Consideration thereof his Majesty agreed, that the said Sir Cornelius, his Heirs and Assigns, or such other Persons as he should appoint, their Heirs and Assigns, should have one full Third Part, in three Parts to be divided; of the said drowned Grounds, to be of equal Value with each of the said other two Parts; and that his Majesty, upon gaining thereof, would grant the said Third Part to the said Sir Cornelius, his Heirs and Assigns, to be holden of his Majesty, his Heirs and Successors, as therein is mentioned: And for that divers Persons did claim Common of Pasture in some Part of the Lands to be drained as aforesaid, his Majesty agreed that a Commission should issue, under the Great Seal, to certain Commissioners, to treat and agree with the said Persons claiming Common, concerning the said Common and Claim to the same.

That the said Sir Cornelius having employed a great Number of Workmen, and expended great Sums of Money, in draining the said Wastes, so that the same were made more fit for Tillage and Pasture, his Majesty conveyed the Third Part thereof to him and his Heirs, and to others appointed by him.

That his Majesty likewise granted a Commission, under the Great Seal, to William Viscount Ayre, John Lord Saville, Sir Ralph Hansby, and Sir Thomas Hansbaw, Knights, to treat and agree with the Tenants and Inhabitants of the Townships, Parishes, and Precincts adjoining to the said drowned Grounds, who claimed Right of Common in the same, touching what Part of the Commons to be improved, they would accept of, in full Satisfaction of their Right and Title in and to the Residue of the said Wastes and Commonable Grounds; which Commissioners, after much Pains taken therein, made an Agreement with the greatest Part of the said Tenants and Inhabitants, and allotted and set out unto them several Quantities and Proportions of the said Wastes and surrounded Grounds, to be by them held and enjoyed in Severalty, divided from the other two Parts.

That the said Sir Cornelius having purchased the said Lordship of his Majesty, divers Controversies arose between him and his Assigns of several Parts of the said Manor of Hatfield, of the one Part; and the Tenants and Inhabitants of the said Manor, and of the Towns of Hatfield, Dunscreaf, Woodhouse, Tudworth, Thorne, Sykehouse, Fishlake, and Stainforth, in the said County, of the other Part; as well concerning their Copyholds within the said Manor and Towns, as Demands of further perfecting the said Drainage, and the Proportions and Allotments claimed to be due to the said Inhabitants; and divers Complaints being made before the Lords of his Majesty's most honourable Privy Council, the same were, in June 1630, referred to Thomas Viscount Wentworth, John Lord Darcy, and Mr. Justice Hutton, or any two of them, whereof the said Lord Wentworth was to be one.

The

That the said Lord *Wentworth* and Lord *Darcy*, with the Assistance of Sir *Robert Heath*, Knight, his Majesty's Attorney-general, and Sir *Robert Parham*, his Majesty's Surveyor, in September 1630, set down some Propositions in Writings, such as they conceived fit and necessary to be observed and kept, and published the same as their final Award.

That some Exceptions being taken in some few Points thereof, Differences arose between the said Parties; but in November following, the Parties made a mutual and final Agreement among themselves, touching the Parts of the said Award to be performed by the said Sir *Cornelius*, and entered into some further Agreement among themselves, on both Parts to be performed.

That to the End the said Tenants and Inhabitants for the Time then being, and such as thereafter should be, might be decreed to stand to the Parts of the said Award, and further Agreements on their Behalf to be observed, the said Sir *Cornelius* exhibited his Bill in the said Court, against the said *Robert Portington*, and others, Tenants and Inhabitants of the said Lordship, who undertook, as well for themselves as for the rest of the Tenants and Inhabitants of the several Towns and Villages of *Hagfield*, *Thorne*, *Stainforth*, *Woodhouse*, *Dunsforth*, and *Tudworth*; to which Bill the said Defendants put in their Answer, confessing the material Points of the said Bill, and consenting for themselves and the rest of the said Tenants and Inhabitants, to allow of such Parts of the said Award, and such further Agreements as in the Bill are mentioned, and that the same might be confirmed by the Decree of the said Court.

And to the End that the said Sir *Cornelius Vermuyden* might be also decreed to perform the Parts of the said Award and Agreement on his Part, *Henry Lea*, the said *Robert Portington*, and several others likewise, exhibited their Bill in the same Court, to the Effect aforesaid, against the said Sir *Cornelius Vermuyden*, who appeared and put in his Answer to the said Bill, confessing that he was ready to stand to the said Parts of the said Award and further Agreements.

That the said Causes coming on to be heard on the said 30th Day of November, the Court ordered that the Parts of the said Award and the said further Agreements should be set down as they were agreed to on each Side, the Parts of which said Award and the further Agreements, so far as the same relate to the Matter in Question in this Cause, are in the Words following, viz.

Award.

" Item, That the said Tenants, their Heirs and Assigns, shall have their Turf Moors, with all the Profits thereunto belonging, throughout the Waste of *Turbary*, in such Manner and Form as they usually heretofore had, and their Copyhold Lands there without Admeasurement; and that there should be sufficient Ways left to the said Moors for Carriage, and the Ways betwixt *Bridge Dike* and *Lane Close* to be enlarged, if there appear, upon View of Persons to be appointed by the said Referrees, that there is Cause of Enlargement; and that those that come to build or dwell upon the Ground of the said Sir *Cornelius*, his Heirs or Assigns, are only to have Liberty to cut Turf on 1000 Acres of Turf Moor towards *Crooke*, and 500 Acres towards *Sandtoffe*, next adjoining to *Wood Carr*, to be set out by Meets and Bounds, by Consent of the said Parties, or by Persons to be appointed by the said Referrees; and the *Turbary*, called the *Lords Moors*, are likewise reserved to the said Sir *Cornelius* and his Assigns; but the said Sir *Cornelius* and the new Inhabitants are to take Turf in the said Places only for their own Burning, and not for Sale.

" Item, That the Tenants of the said Manor, and the Members thereof, shall have unto them and their Heirs, or such other Persons and their Heirs as they shall appoint, their former Allotments for their Common confirmed unto them, according as they were set out by *John Lord Saville* and others, the 14th of March 1627, with an Addition of 200 Acres more in *Ditch Marsh*, and 403 Acres of Land in *Ferne Carr*, to be assured unto the said Tenants in Exchange for 403 Acres in *West Moor*; all which Parcels of Ground allotted and to be allotted and exchanged with the said Tenants, shall be drained and so kept, according to the Articles made between his Majesty and the said Sir *Cornelius Vermuyden*; and that the said Sir *Cornelius* and his Heirs, upon Request, shall convey or cause to be conveyed unto such Feoffees and their Heirs, as the said Tenants or the more Part of them shall nominate, such Part of the said Moors not holden by Copy of Court Roll, and other Ground within the said Manor, as are allotted to and for the said Tenants to be holden in free and common Socage.

" Item, That the said Tenants cause *Ditch Marsh* to be surveyed, so as it may appear that they shall have the full Moiety thereof, and 200 Acres more, and the same to be set forth by the said Referrees, so as it may lye conveniently for *Sikehouse* and *Fishlake* as well as for *Thorne*, wherein Regard shall be had to accommodate the said Sir *Cornelius* and his Assigns, as well for any new Draining to be made therein, as otherwise, without Prejudice to the said Tenants.

" Item, That the said Tenants and Inhabitants shall have all Lanes, Ways, and Passages to continue to them, their Heirs and Assigns, in Common, as formerly they had, and that they be not charged with Payment of any Toll for Passage through the Lock, or any other Passage by Water or by Land.

" Item, That the said Sir *Cornelius*, his Heirs and Assigns, shall cause all their Grounds to be sufficiently fenced against the Allotments of the Tenants.

" Item, That the said Tenants and Inhabitants, their Heirs and Assigns, shall at all Times hereafter be discharged of the Dues, and of all Laws of Forest and Chace."

Further Agreements.

And the further Propositions and Demands of the said Tenants, and assented unto by the said Sir *Cornelius*, not mentioned in the said Award, are in the Words following, viz.

That

"That the said Sir Cornelius, his Heirs or Assigns, have paid any Rent to the Crown, or any Outrent or other Duties for the new inclosed Grounds called *Thorn-land*, or *Middle-land*, lying near *Hopwell Hill*, shall for ever hereafter be fully and wholly discharged, and freed from paying any such Rents or Duties.

"That in such Places as the said Sir Cornelius, his Heirs or Assigns, have digged, or shall dig up Paggins, fit and convenient, in Places near adjoining to the former, and as convenient as those were.

"That the said Tenants and Inhabitants, their Heirs and Assigns, shall be for ever hereafter discharged of all Rents heretofore granted to his Majesty, for any Assignment in any Part of the said Wastes.

"That neither the said Sir Cornelius and his Tenants, of the two Parts Improved, nor their Heirs or Assigns, shall have any Common in the third Part allotted and set out for the Use of the Tenants and Commoners.

"That the Tenants and Inhabitants of the several Towns, Villages and Places aforesaid, their Heirs and Assigns, shall have free Liberty to dig Clods, Earth, and Gravel, in and upon the said Highways and Lanes, in Places fit and convenient for their necessary Uses.

"That the said Sir Cornelius, and his Heirs, shall convey and assure unto the said Tenants and Inhabitants, their Heirs and Assigns, one Parcel of Marsh Ground, called *Bramwith-Marsh*, over and above the several Parcels of Marsh Ground allotted unto them by the Certificate of the said Lord Saville and others.

"That the Tenants and Inhabitants of the Manor of *Crofton*, shall have and enjoy to them and their Heirs, 400 Acres of the said Turf Moors, for their Turbary; in which 400 Acres, the said Tenants and Inhabitants of the said Lordship of *Hatfield* and *Thorne*, are not to cut or grave any Turfs.

"That the said Sir Cornelius is to allow unto the said Tenants and Inhabitants, by way of Exchange, 100 Acres of Ground, lying in the Severals, for 100 Acres of Ground lying in *Ditch-Marsh*, formerly allotted to them; and that the Drayne, which, by Agreement, is to be made by the said Sir Cornelius about the *West-Moor*, shall be made and finished before the 24th of August, 1631.

"That the said Sir Cornelius, and his Heirs, and their Tenants and Farmers of such Copyhold Tenements as he hath lately purchased from *Zanquer*, one of the Daughters of the said Viscount *Ayre*, shall enjoy Common of Pasture and Turbary, within the said Wastes and Moors allotted unto the said Tenants, according to the Custom of the Manor.

"That according to the Certificate of the said Viscount *Ayre* and others, the said Tenants and Inhabitants, shall and may, have and enjoy, these Parcels of Common following; to wit, the *West-Moor*, containing 893 Acres; the *Lings*, 210 Acres; *Woofers-Carr*, *Brickbill-Carr*, and *Halebill-Carr*, 347 Acres; *Remple-Carr*, 84 Acres; the *Clowns*, 467 Acres; *East Ramhays*, 202 Acres; *Brerham* and *Kirton-Carr*, 380 Acres; *Bramwith-Marsh*, 35 Acres; *Burgar* and *Hatfield-Moor*, 130 Acres; *Hatfield Hills*, 66 Acres; a Piece of Ground, called the *Common*, on the further Side of the Water, 65 Acres; the *West-Nabb*, 138 Acres; *Kirkstoun-Nabb*, 15 Acres; the *Moiety of Dyke's-Marsh*, and 200 Acres over; all which said several Parcels of Ground, the said Tenants and Inhabitants are by the said Certificate, to hold to them and their several Heirs, in Lieu and Recompence of their several Claims of Common, in all the rest of the said Wastes and Commonable Grounds.

And the Court thereupon decreed, in the Presence of the Counsel and Parties on both Sides, and with their mutual Consent, that the Parts of the said Award and Agreements before expressed, and Certificate of the said Viscount *Ayre*, and others, should from thenceforth be observed and performed by the said Parties; and that as well the said Sir Cornelius, and his Heirs and Assigns, as the said Tenants and Inhabitants; and all other the Tenants and Inhabitants of the several Towns, Villages, and Hamlets, that then were, and that thereafter, for the Time being, should be; and their Heirs and Assigns, should for ever thereafter be bound to observe and perform the said Award and Agreement, by Virtue of the said Decree.

That by Indenture of Feoffment, dated the 15th of July, 1633, and made between the said Sir Cornelius Vermuyden, and John Gibbon, Esq; of the one Part, and Henry Lee, Roger Portington, and several others, therein named, of the other Part; reciting the said Commission so granted to the said Viscount *Ayre*, and others, and the Allotment by them made as aforesaid, and the said Award so made by the said Viscount *Wentworth*; and that his Majesty had granted to the said Sir Cornelius Vermuyden, the said Lordship of *Hatfield*, with all the Wastes and Commons thereto belonging; of which Lordship, the said Parcel of Ground, called the *West-Moor*, and the several other Parcels of Ground beforementioned were Parcel; and that the said John Gibbon was lately become interested in the said Lordship under the said Sir Cornelius. The said Sir Cornelius and John Gibbon, for divers good Causes and Considerations, and especially for and in Performance of the said Award, granted, enfeoffed, and confirmed unto the said Henry Lee, Roger Portington, and others therein named, their Heirs and Assigns, all those Parcels of Ground beforementioned, as the same are allotted and set forth; with the Appurtenances, and all Commons, and Turf Moors, Rights, Profits, Privileges, Emoluments, and Commodities to the said Premises; or to any the Messuages, Lands, or Hereditaments, of any the said Tenants belonging; and all the Right, Title, Claim, Interest, Property, and Demand, of the said Sir Cornelius Vermuyden, and John Gibbon, their Heirs and Assigns, in and to the Premises, to hold to, and to the Use of the said Henry Lee, Roger Portington,

ington, and others, their Heirs and Assigns for ever; notwithstanding, upon Special Trial and Verdict, and for the full Benefit, Peace, and Quietness of themselves and their Heirs, and of all and singular other the Tenants and Inhabitants of *Horsfield, Thorne, Dunscroft, Stainforth, and Stainforth*, and of all and other the Tenants and Inhabitants of, and within, the said Manor of *Stainforth*; and of every of them severally and respectively, to use and enjoy the same, and every Part and Parcel thereof, as formerly they have done or been accustomed to do.

That *Sir Arthur Ingram*, as Assignor of the Appellants, and who had purchased the said Manor, having inclosed Part of the said Commons, as the Tenants alleged, and upon other Differences between him and them, *Timothy Perkins*, and other Tenants of the Manor, in *Trinity Term, 1640, 16 Car. I.* exhibited their Bill in the said Court of *Exchequer*, for Relief against the said *Sir Arthur Ingram* and others; and in their said Bill, they set forth, not only the said Decree and Feoffment, but also the Articles of Agreement made with the Tenants and Inhabitants, by the said Viscount *Irwin* and others, upon the first Commission for making the Tenants *Alotments*; wherein is contained the following Article: viz. That it was agreed, that all and every the said Tenants, Freeholders, Customary Tenants, and Inhabitants, of all and singular the Townships, Villages, and Hamlets aforesaid, should, and might, for ever thereafter, in the said several Wastes and Parcels of Ground so allotted, assigned, and set out to every of them respectively as aforesaid, have, take, and use their Common for all Manner of Beasts commonable, in such Manner and Form, as they had in all, and throughout all, the said Wastes before the Improvement thereof. And after setting forth the said Commission, Articles, Award, Decree, and Feoffment, they charge that the said *Sir Arthur Ingram* had inclosed Part of the said Tenants *Alotments*, and would not permit them to enjoy any Common there, according to the said Articles, Award, Decree, and Deed, as was thereby intended unto them; from whence it appears, that the Tenants and Inhabitants did not at that Time claim any more than a meer Right of Common in the said Lands.

An ancient Office Copy of this Bill, with the Draught of the Answer, and Office Copy of the Replication and Draft of the Rejoinder, were found among the Appellant's Family Writings at his Seat; but upon searching for the Records, though an Entry of the said Bill being filed appears in the Books of the said Court of *Exchequer*, and several Orders appear to have been made in the said Cause, yet the Records of the said Pleadings are not to be found.

That several of the Copyhold Tenants desiring to have their Copyholds enfranchised, *Sir Arthur Ingram*, by two Deeds, the one dated the 20th *December 1639*, and the other dated 27th *October 1640*; granted the said Copyholds to the said respective Tenants and their Heirs at certain Rents therein mentioned, whereby the said Copyholds became enfranchised; and in the same Deeds are contained Grants to the said Tenants of Pasture, and Common of Pasture, to be used with the said Premises, and as belonging thereto, yearly, for all Manner of Cattle, in the several Parcels of Moors, Wastes, or Grounds, then laid out for Common, for the Tenants of the Manor, by one or more Decrees of the Court of *Exchequer*, or otherwise by Agreement since, in which the Tenants of the Manor have Common; by which Deeds it appears, that the Right of the Tenants was then looked upon to be only a Right of Common, as belonging to their Tenements.

That the said *Sir Arthur Ingram*, and those claiming under him, have from Time to Time, since the making of the said Decree and Feoffment, done several Acts of Ownership as Lords of the said Manor, and as Owners of the Soil of the said Commons, and have by the said Tenants been considered as Owners of the Soil of the said Commons.

That in the Year 1726, an Act of Parliament having been obtained for making the River *Dun* navigable, which River runs through Part of the said Manor, whereby a great Resort was occasioned to the said River, and thereby the Commons and Wastes of the said Manor were much damaged by Carriages loaded with Goods, to and from the said River, passing over the same where no Highway was, so that the said Wastes were in Danger of being destroyed, or greatly damaged by the subverting of the Soil; *Arthur*, late Viscount *Irwin* deceased, the Appellant's Brother, and then Lord of the said Manor, erected a Fence, like a Turnpike, upon a Piece of Ground near *Stainforth*, in order to stop such Carriages, and oblige them to keep the Highway, and thereby prevent the said Commons from being spoiled; and several Persons having made towing Paths, and moored their Vessels upon the Banks of the said River, and also built Wharfs and Landing-places upon the same, and laid great Quantities of Coals, Wood, Lead, and other heavy Goods upon the said Commons near the said River, and having dug up and subverted the Soil of the said Commons with Carriages as aforesaid; the said *Arthur Viscount Irwin*, about the Year 1726, brought an Action of Trespass against *Richard Middlebrook, William Middlebrook, Thomas Middlebrook, Samuel Maggot, and Joseph Howard*; for such Trespasses in certain Parcels of Ground, called *Hangman's Hill*, the Soil of the old River, the Bank, and the Common of *Thorne*, within the said Manor; to Part of which Trespasses they pleaded Not Guilty; and as to the rest, justified under a general Prescription to navigate upon the said River, and a Custom to tow and moor their Vessels, and to fix Anchors, Posts, and Stakes upon the Banks thereof; and the Cause being tried at the *Leam* Assizes for the County of *York*, in the 4th Year of his present Majesty's Reign, a Verdict was found for the said *Arthur*, late Lord *Irwin*.

That some of the Tenants and Inhabitants being concerned in the Navigation of the said River, and being desirous to subject the Wastes of the said Manor to their Convenience in the Navigation, and finding they could not do it upon a general Prescription, began to set up a Right under the said Decree and Feoffment; and in *Trinity Term*, in the 5th Year of his present Majesty's Reign, *William Simpson, Thomas Morris, Thomas Hill, Edward Forster*, the said *Richard Middlebrook, Thomas Middlebrook, and Samuel Maggot*, and several others since deceased, as Tenants and Inhabitants of the said Manor, on Behalf of themselves, and the other Tenants and Inhabitants of the said Manor, exhibited their Bill in the said Court of

of Exchequer, against the said *Arthur Viscount Irwin*, as Lord of the said Manor, and *Thomas Canby*, his Steward thereof, in order that they might be quieted in the Enjoyment of the several Lands, and the Benefit of navigating their Vessels up and down the said River, with all Privileges, Ways, Easements and Profits thereto belonging, and allotted to them under the said decreed and Decree; and that the said Lord *Irwin* might be enjoined from proceeding in the said *Assize*, and that the said *Canby* might produce the said Feoffment; and the said Bill, after setting forth the said Decree and Feoffment, charged that the Piece of Ground whereon the said Fence was erected, was Part of the said allotted Commons; and that the several Parcels of Ground called *Hangman's Hill*, the Soil of the old River, the Bank and the Common of *Thorne*, were expressly allotted to the Tenants of the said Manor, and ought to be held by them, Right, by Virtue of the said Agreements and Decree, to pass through the said Parcels of Ground, and to make use of the towing Paths, and to fix and moor their Vessels to the Banks of the said River, and to use all other necessary Easements of Navigation upon the said River; and that they made no Defence at the said Trial, as the Merits of the Case, as they alleged, would not properly come in Question, the Plaintiffs, as they pretended, not being, at the Time of pleading, apprised of the said Decree and Feoffment; and that the said Feoffment was in the Hands of the said *Canby*, who was a Copyholder, in Trust for all the Tenants and Inhabitants.

That the said *Arthur Viscount Irwin*, by his Answer, admitted that he was Lord of the said Manor, and intitled thereto for Life, under the Will of his late Brother *Edward Viscount Irwin*, deceased; and he filed that, to his Knowledge or Belief, the Piece of Ground whereon the said Fence was erected, and the Pieces of Ground called *Hangman's Hill*, the Soil of the old River, the Bank and the Common of *Thorne*, were Part of the Grounds so allotted to the Tenants and Inhabitants as aforesaid; or, in Case they were, yet he insisted that the Tenants had no Right to dig or subvert the Soil, or to pass over the same with Carriages, or to deposit their Goods, or make Wharfs or Warehouses on the said Parcels of Ground, by Virtue of the said Agreements, Decree, or Feoffment; for that they have not thereby any Right to the said Waives other than the Herbage thereof, and to take Turbary in proper Places, and to take the Profits of the Waives, antecedent to the said Feoffment, in such Manner as they took the Profits of the rest of the said Manor, had used all the common Badges of Ownership of the Soil and Vulture, except the Herbage and Turbary of the said Waives, and the Defendant *Canby*, by his Answer, said he never refused to produce the said Deed of Infeoffment, but was always ready to produce it, and had produced it to several of the Tenants and Inhabitants, and given them Copies of it.

That the said *Arthur Viscount Irwin* died in 1736, and thereupon the said Plaintiffs, in *Michaelmas* Term 1737, revived the said Suit against the Appellant his Brother, who by his Answer admitted that he was Lord of the said Manor, and intitled thereto for Life, under the Will of his said Brother *Edward*, late Viscount *Irwin*, deceased; and the said *Thomas Canby* being also dead, the Suit was revived against *Mordecai Cutts*, his Executor.

That Issue being joined in the said Cause, the Appellant examined Witnesses to shew that the said Commons were reputed to be, and were considered as allotted to the Tenants and Inhabitants for their Common of Pasture only, and that the Soil was always reputed to be, and in a Variety of Instances considered as being in the Lord; and that he, from Time to Time, did Acts of Ownership as Lord accordingly; and, on the other Hand, the Respondents have only attempted to shew some pretended Acts of Ownership in the Tenants (besides depasturing their Cattle and digging Turfs) by extracting Wood out of the Ground, which is frequently found buried there, and sometimes making Bricks, which Acts might be done by Neglect of the Steward, the Family being at a Distance from the said Manor, and are such Acts as in their Nature are not decisive Acts of Ownership.

That in *Eastm* Term 1753, the Cause coming on to be heard in the said Court of Exchequer, it was ordered that the Parties should proceed to a Trial at Law upon the following Issues. 1st, Whether the Ground whereon the Turnpike was erected, was or was not Part of the Tenants Allotments. 2dly, Whether there was or was not, at the Time of erecting the said Turnpike, a common Highway over that Ground. 3dly, Whether there was or was not, at the Time aforesaid, a Way for the Tenants over that Ground where the Turnpike stood, from *Stainford* to a common Field called *Inn Crofts* or *Kirktown Nabb*, or either, and which of them. 4thly, Whether the uninclosed Ground, lying on the East Side the River *Dun*, and between the River and the great Bank, commonly called the *Participants Bank*, and extending from a Place called *Baland Lane* South, to the Place opposite to a Place called *New West North*, or any, and what Part thereof was Part of the Tenants Allotments; and the Cause was to be continued in the Paper of Causes to be further heard after the said Trial, and till when the Consideration of Costs, and of all further Directions touching all the Matters in Question in the said Cause, was reserved.

That the Respondents waived the first and second Issues, whereby they admitted that the Ground whereon the Turnpike stood, was no Part of the Tenants Allotments, nor any Highway; and the Appellant waived the third Issue, as thinking it immaterial, since the said Fence was not erected or made in such a Manner as to hinder the Tenants from going to their Closets, but only to hinder the Passage of Carriages loaded with Goods to the Ships on the River, and oblige them to keep the Highway; and the said fourth Issue, in which were comprized the said several Parcels of Land called *Hangman's Hill*, the Soil of the old River, the Bank and the Common of *Thorne*, coming on to be tried afterwards at *York* Summer Assizes 1755, a Verdict was found for the Plaintiffs, whereby it was found that the said several Parcels of Land called *Hangman's Hill*, the Soil of the old River, the Bank and the Common of *Thorne*, were Part of the Tenants Allotments, although the same lay on the Outside of the Bank, which had been made for innings and draining the said Allotments.

That

That after the said Trial, the said Cause came on to be further heard in the said Court of Exchequer, the 19th and 26th of December following, when the Appellant's Counsel moved, as they had done on the former Hearing, when the said Issues were directed, that the Plaintiff should prove the said Feoffment, as Trustees for the Tenants and Inhabitants, as on their Right of Common, and that, as to the Soil, there was a resulting Trust in the Lord of the Manor under the said Feoffment, as well from the Nature of the Case, and the Facts and Circumstances thereof, as from the general Tenor and Import of the several Proceedings and Instruments aforesaid, and a reasonable Construction of the said Feoffment; and also offered to read the said Bill, between *Rathus* and *Agrom*, in 1640; and other Evidence to support such their Construction of the said Feoffment; but the Respondents Counsel objected to the reading any Evidence on the Part of the Appellant, and the Court allowed the Objection.

And the Cause coming on again to be heard the 17th of the same December, the Court dismissed the Bill, as to so much thereof as relates to the Claim of the Ground whereon the Turnpike stood, as Part of the Lands allotted to the Tenants; and the Appellant having insisted, as Lord of the Manor, on a Right to the Soil of the Lands allotted to the Tenants, the Court disallowed the same, and ordered and directed, that the Respondents should hold and enjoy the Lands found in the Fourth Issue, and all other Lands allotted to the Tenants, according to the Decree and Infeoffment against the Appellant, and awarded an Injunction to quiet the Respondents in the Possession thereof, during the Life of the Appellant; and decreed the Appellant to pay the Respondent the Costs of the original Bill, and Bill of Revivor, with subsequent Costs at Law and in Equity; and that the Respondent should pay the Defendant *Cutts* his Costs, and should have so much of them over again from the Appellant as were incurred to the Time of the Answer of the Defendant *Cutts*; and the Costs of the Motions and Order about producing the Deed of Feoffment; and that the Deed of Feoffment should be brought into Court by the Defendant *Cutts*, in Order to be inrolled.

That the Appellant apprehending himself to be aggrieved by the said Decree, and particularly that Part thereof, whereby the Objection to the reading of the said Evidence on the Part of the Appellant as aforesaid, was allowed; and also as to such Part thereof as disallowed the Claim of the Appellant, as Lord of the Manor, to the Soil of the allotted Commons, and on that Foundation ordered, that the Respondents should hold and enjoy the Lands found in the Fourth Issue, and all other Lands allotted to the Tenants, according to the Decree and Feoffment, against the Appellant, and awarded an Injunction to quiet the Respondents in the Possession thereof during the Life of the Appellant; and also that Part of the said Decree, whereby it is directed that the Appellant should pay the Respondents the Costs of the original Bill and Bill of Revivor, with subsequent Costs at Law and in Equity; and also whereby it directs the Appellant to pay so much of the Defendant *Cutts*'s Costs as were incurred to the Time of the Answer of the Defendant *Cutts*, and the Costs of the Motions and Order about producing the Deed of Feoffment, hath brought his Appeal against the said Parts of the said Decree; and hopes they shall be reversed or varied, for the following, among other

REASONS:

I. For that, it appears by the several Acts and Instruments above stated, That the Controversies, between the said Sir *Cornelius Vermuyden* and the Tenants and Inhabitants of the said Manor of *Hatfield*, arose only, upon the Claim and Pretensions of the said Tenants and Inhabitants to Right of Common, in the waste Grounds in the said Manor; as by the said Agreement, dated the 24th of March, 2 Car. 1. the said Sir *Cornelius Vermuyden* was to drain the Grounds, and was to have one third Part for the Use of himself and his Heirs absolutely, and free from any Right of Common; by Means whereof, the said Commoners would be deprived of their Right of Common, in such third Part of the said Waste.

II. For that, the Lands, by the Commissioners Certificate, allotted and confirmed to the Tenants and Inhabitants of the said Manor, were agreed to be kept drained, and were so allotted to them, as a Satisfaction for the Loss of their Right of Common, in the other Part of the Waste. But it was only intended, that the Tenants and Inhabitants should have the sole Benefit of the Agistment of these Lands, which were to be so preserved drained for such their Benefit; not that they should have the Ownership of the Soil of the said Lands.

III. For that, the Right to the Soil of the said Lands, does not seem to have been in Question, or attended to, in the said Award, Articles, or Decree; the Matter in Controversy, being only, the Right to Depasture upon the said Commons and Waste. And although, by the said Feoffment of the said Sir *Cornelius Vermuyden*, the said allotted Lands are granted to the said Trustees and their Heirs, in Trust for the sole Benefit, Profit, and Commodity of themselves and their Heirs, and of all other the Tenants and Inhabitants of the several Townships therein mentioned, and other the Tenants and Inhabitants of and within the Manor of *Hatfield*; yet, the said Grant was made, in Performance of the said Award, and expressly in Trust, that they should use and enjoy the same, as formerly they had done, or been accustomed to do. So that, as the Feoffment is relative to the Award, and the Award and all the other Proceedings, (which seem to be relative to one another) had in View, only, the Right of Common, and not the Right to the Soil of the said Lands; the Right of Common, ought only to be enjoyed by the Tenants and Inhabitants, and not the Soil.

IV. If the Right to the Soil passed to the Trustees in Fee, it must be in Trust for themselves and the Tenants and Inhabitants, as joint Tenants, or Tenants in common of the equitable Interest therein: If it were as joint Tenants, then the whole Interest must be in the Heir of the Survivor, which is absurd: If as Tenants in common, then every Tenant and every Inhabitant had, by the Grant, a separate Right to an equal undivided Share of these Lands, which have descended to their several Heirs, or been conveyed by them, and must be, now, vested in a Thousand different Persons; and the Heir of every Co-tenant will be intitled to an equal Share of these Lands, with the most substantial Freeholder; and every one of them may have a Right to a Partition. But if the Trustees are Trustees for the Tenants and Inhabitants, in order to enable them to enjoy the Benefit of the Depasturage of these Lands, in the same Manner as they formerly had been accustomed to do; and if the Right to the Soil was preserved by them as a Resulting Trust for the Benefit of the Lord, the same not having been intended to be granted for any other Purpose, than only to give the Tenants and Inhabitants a Power to enjoy solely the Depasturage of the said allotted Lands, then the said Feoffment will be free from all the absurd Consequences above-mentioned, and the Tenants and Inhabitants will have secured to them effectually, by Means of the said Feoffment, the full Benefit intended them.

V. For that, as the said Deed is an ancient Deed, executed One hundred and twenty Years ago, and upwards; if the Deed is conceived in doubtful Words, with Regard to the Right of the Soil, it is conceived, that any ancient Evidence, or Writing, ought to be admitted, to shew how the same was understood, and what was taken to be the Meaning and Intent of it, recently, upon, and shortly after the making thereof.

C. PRATT.

THO. SEWELL.

R. WILBRAHAM.

on, and look) after the making thereof, and what was taken in the fishing and latent of its richness, upwards, that any ancient Evidence, or Writing, ought not be admitted, to shew how the it is conceived, if the Dead is conceived in doubtful Words, with Regard to the Right of the Soil, upwards; as the said Dead is an ancient Debt, extended One hundred and twenty Years ago, and

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The Right Honourable Henry Lord
Viscount Erwin, in that Part of } Appellant.
Great Britain called Scotland,

Respondents, }
William Simpton, Thomas Morris,
Thomas Hill, Edward Forster,
Richard Middlebrooke,
Thomas Middlebrooke, and Samuel Meggot, - - -

The Appellant's CASE.

To be heard at the Bar of the House of Lords, on
the Day of 1758.